No. 3947

United States
Circuit Court of Appeals
For the Ninth Circuit

J. BILBOA and WILLIAM BORDA,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Petition for Rehearing

Upon Writ of Error to the United States District Court of the District of Nevada.

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FILED

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This Honorable Court on February 26th, 1923, affirmed the judgment and verdict rendered in the District Court against each of the plaintiffs in error. We believe that there is a misapprehension of fact in regard to the state of the record in this case, in the mind of the Court.

In the case at bar not only was a motion for a new trial made in the case, but also a motion to vacate judgment was made. (Pages 25, 26 & 27 Transcript of Record. Both of these motions were

denied. Both motions included the ground, that the evidence was insufficient to support the verdict. This objection was called directly to the attention of the trial court and it is therefore that counsel for plaintiffs in error respectfully submit that the cases Finley vs U. S. 256 Fed. 845; Central R. Co. of N. J. vs Sharkey; Robinson vs Belt 187 U. S. 41; are inapplicable. The latter two cases are civil cases. In criminal cases, where the liberty and freedom of citizens are involved, this Honorable Court has in various instances considered substantial errors even of its own motion, manifestly to prevent a judicial wrong.

We earnestly and respectfully submit that in this case, innocent men are convicted of a crime where the evidence even viewed most unfavorably tends only to cast suspicion on them. The fundamental principle of the law, that a man is presumed innocent until proven guilty by substantial evidence is violated by the judgment and verdict. The rule that where the evidence does not exclude the hypothesis of innocence and where the evidence is consistent with innocence that in such instances the evidence is insufficient to convict is absolutely disregarded. A vital right of defendants is infringed upon, producing such a miscarriage of justice which we respectfully submit would justify this Honorable Court in considering and reviewing the record of its own motion.

In our brief and assignments of error we endeavor to present to this Honorable Court that the evidence adduced in this case was insufficient particularly because the element of guilty knowledge was not proven; that in fact this necessary element

of every crime was absolutely disregarded and no evidence whatsoever was introduced from which guilty knowledge could be rightly inferred. We respectfully submit that even before the amendment of Sec. 69 of the Federal Code, the Supreme Court of the United States in Wiborg vs U. S. 163 U. S. 632 and particularly in Clyatt vs U. S. 197 U. S. 207, noticed and examined the record where such a plain error was called to its attention.

> "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."
>
> Clyatt vs U. S. 197 U. S. 207-222.

With the amendment of Sec. 269 Federal Code this spirit of the Supreme Court was endorsed and approved by Congress.

The necessary elements of the crimes in the case at bar are not proven, and further no evidence was introduced which would justify a jury in finding those elements. Every bit of evidence was consistent with innocence.

We agree with this Honorable Court that where defendants are indicted on three counts, "It was the duty of the jury to return a verdict upon each count". The last sentence of the decision, namely "and the fact that it found the defendants not guilty on one count is not conclusive as to their guilt on

the others," is not clear to us. All we contended in our brief and oral argument as to the inconsistency of verdicts was that we would have to consider the necessary inference which followed from a verdict of guilty on the nuisance count. That it is presumed the jury considered only evidence submitted to them. That where there was only one instance of misconduct offered in evidence as in the case at bar and where one count was necessarily included in the other count, namely sale and maintaining a nuisance by keeping liquor for sale, that in such a case there was prima facie serious doubt as to the sufficiency of the evidence to convict on any count. This particular fact is urged by us as the more reason for the scrutiny and examination of all the evidence in the case.

The sentence "It was the duty of the jury to return a verdict upon each count of the indictment and the fact that it found the defendants not guilty on one count is not conclusive as to their guilt on the others," in our mind seems to be drawn a little hastily or cursorily or is not an accurate transcription of the opinion of this Honorable Court.

We earnestly submit that considering the important precedent established by this decision and in view of the fact that a motion for new trial and a motion to vacate judgment was denied by the trial court and in view that error was assigned in said motions and on this writ of error that the evidence was insufficient to support the verdict and particularly that the necessary elements of the alleged crimes were not proven and that no evidence was introduced to justify the finding of such crime by the jury, that this error is of such vital importance

to plaintiffs in error as to warrant the examination of the record by this Honorable Court to see that no miscarriage of justice was perpetrated.

Respectfully submitted,

HUSKEY & KUKLINSKI,
Attorneys for Plaintiffs in Error.